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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Appeal is from New York Court of Appeals. The appeal is from the judgment of the Court of Appeals of the State of New York (R. 59-60), the highest Court of the State. It is a final judgment which leaves nothing to be done by the lower Court except the ministerial act of entering an order accordingly (Jurisdictional Statement, pp. 10-11), which was done (R. 67). The judgment of the Court of Appeals is the final judgment reviewable here (*Department of Banking* v. *Pink*, 317 U. S. 264).

All Facts Conceded. All of the facts stated in the complaint (R. 4-35) were conceded in open Court when the case was heard in the Court of first instance (R. 2-3). The answer is to be disregarded as superseded by the concession of facts.

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Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANTS

Escheat Inapplicable to the Policies

Escheat inapplicable to unperformed conditional life insurance policies as distinguished from recognized, liquidated and unconditional debts such as deposits in banks, courts, utility companies, etc.

The cases cited by appellee all involve recognized liquidated debts payable to someone upon mere demand, such as deposits in banks (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282; *Provident Institution for Savings* v. *Malone*, 221 U. S. 660); deposits in Courts (*U. S.* v. *Klein*, 303 U. S. 618);

deposits with utility companies (*Brooklyn Borough Gas Co.* v. *Bennett*, 154 Misc. [N. Y.] 106); and unclaimed corporate dividends (*In re Philadelphia Electric Company*, 352 Pa. 457).

As stated in the *Anderson* case, a deposit "gives the bank merely the right to use the depositor's money until called for by him" (p. 286).

Life insurance, however, is a conditional contract both as to liability and amount of liability. It is not a matter of depositing a dollar and getting a dollar back. It is an association of many persons, some of whom will get back many times what they have paid, and others less, according to their length of life, age, cause of death, etc. It is a business of risks, a method of sharing the losses. Its investment features are inseparably intertwined with the conditional nature of insurance. These conditions are contracts which the Constitution forbids any State to impair (cases cited in our main brief, pp. 22-4).

Legally the position of the companies seems unassailable. They want only to have the terms of their contracts respected.

Equitably the rights of the companies and all of their policyholders to any savings which may come from so-called abandoned policies seems far superior to that of the New York public which has contributed nothing to the insurance assets out of which the payments would come, or to the losses on other policies.

No debt to escheat because proof of death, age, etc., is a condition precedent to liability.

It is conceded that these policies all provide that they are payable only upon due proof of death, age, etc. (R. 6-7, 14, 17, 65); that no such proof has been furnished (R. 14, 17, 52, 65); that nothing is held owing or payable

in fact (R. 14, 17); and that in the absence of such proofs it is impossible to determine the facts as to death, or how death occurred, or the correct age, etc. (R. 8, 14, 17); all of which affect the question of liability and amount of liability under the various conditions of the policies, the terms of which are conceded (R. 8, 9, 14, 17; and described in our main brief, pp. 3-4).

Law settled that proofs are condition precedent to liability.

As to the law, all of the authorities, including the cases cited by appellee, hold that nothing is owing under these policies unless and until the proofs required by their terms have been furnished to the insurance companies.

Appellee cites (at p. 17) *Wachtel* v. *Equitable Life*, 266 N. Y. 345, a leading case which holds that "proof of death * * * is a condition precedent to liability" (p. 350) and "till such proof was given * * * no liability * * * could arise" (p. 352).

Other leading cases are all to the same effect.

Bergholm v. *Peoria Life*, 284 U. S. 489, also holds that "the obligation of the contract does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to * * * payment" (pp. 491-2), and "to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent * * * would be to vary the plain terms of a contract in utter disregard of long settled principles" (p. 492).

O'Reilly v. *Guardian Mutual*, 60 N. Y. 169, also holds that there is no liability unless and until due proofs are furnished, the purpose of the provision being to enable the insurer "intelligently to form some estimate of his rights and liabilities before he is required to pay" (p. 173).

Nothing to contrary cited by appellee.

Appellee fails to cite a single case to the contrary. Some of the cases cited by appellee are entirely irrelevant and the others confirm appellants' contentions.

Reed v. *The Provident, etc., Society,* 190 N. Y. 111 (appellee's brief, p. 11), involved the question of whether the beneficiary had an insurable interest. Proofs of death *had* been furnished to the insurance company, and it appears that all the conditions of the policy had been performed (see p. 114). The policy was not payable upon death but upon due proof of death.

Burnet v. *Wells,* 289 U. S. 670 (appellee's brief, p. 11), was an income tax case which does not contain anything about proofs of death, age, etc., or as to when a policy becomes due, or anything else relevant to the case at bar.

Central Bank of Washington v. *Hume,* 128 U. S. 195 (appellee's brief, pp. 11-12), is equally devoid of anything pertinent here. It was simply a controversy between the beneficiary and her husband's creditors over the proceeds of insurance admittedly due (p. 199). It does not hold or even suggest that a policy is payable without due proof of death, age, etc., but, on the contrary, states that the company's duty is "to pay according to its terms" (p. 205).

McDonnell v. *The Mutual Life,* 131 App. Div. 643 (appellee's brief, p. 12), does not hold that a policy is payable upon the death of the insured, without more. On the contrary, the opinion states that the beneficiary *had* furnished proofs of death. An interesting feature of this case is that if the insured had lived 11 days longer the policy would have yielded a "15 year dividend" equal to nearly 50% of the face amount of the policy, illustrating the importance of proofs in determining how much, if anything, is due upon a policy. As the court pointed out "the rela-

tion of a policyholder to an insurance company is purely contractual" and although premiums had been paid for nearly 15 years, the court could not alter the contract.

Anderberg v. *Metropolitan Life*, 269 App. Div. 640 (cited at p. 12 of appellee's brief), involved an endowment policy which also contained provisions for an additional accidental death benefit. The court held merely that the accidental death coverage did not continue after the endowment period. It did *not* hold that a policyholder or beneficiary need not file proofs of survival or of death and comply with the other conditions of the policy.

New York Life v. *Federal Natl. Bank*, 151 F. 2d 537, cert. denied 327 U. S. 778, reh. denied 327 U. S. 816 (appellee's brief, p. 12), held that when due proofs of death *had* been furnished and the insurer had paid in good faith to the assignee of the policy, the insurer could not be forced to pay twice upon the ground that the insured was incompetent when he made the assignment. It also refers to a clause in the policy reading, "The company assumes no responsibility for the validity of any assignment" (p. 540), and points out that if the company were "compelled to carefully investigate" each assignment it "would place an impossible burden upon the company" (p. 541). In the case at bar the statute and decision below seek to saddle the companies with the "impossible burden" of determining, in the absence of the proofs required by the terms of the policies, whether these policyholders are living or dead, the cause of death, the correct age, etc. (R. 8, 14, 17)—burdens which, for obvious reasons, they never assumed, having lawfully contracted that payment was conditioned upon due proofs of the facts being furnished to them (R. 6-7, 14, 17, 65).

Pape v. *Home Ins. Co.*, 139 F. 2d 231 (appellee's brief, p. 13), has no relevancy that we can see. It involved insurance against confiscation of cotton during the Spanish civil war in 1936.

Van Saun v. *Metropolitan Life*, 135 Misc. 855 (appellee's brief, p. 13), sustains the insurer's right to contest a policy for misrepresentations in the application.

McCaffry v. *Metropolitan Life Insurance Company*, 172 Misc. 252, aff'd 261 App. Div. 452, aff'd 287 N. Y. 704 (appellee's brief, p. 16), held that proof of death was "a condition precedent to recovery" and that "due proof of death would comprise any fact relevant to the fact of death and the identity of the insured and questions directed to these particulars are proper and should be answered by the claimant, the physician, or any other person."

Buffalo, etc., Safe Deposit Co. v. *Knights, etc., Assn.*, 126 N. Y. 450 (appellee's brief, p. 16), also held that proof of death was a condition precedent to liability and that this condition "entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty, and if the proofs furnished failed to satisfy the association of the fact of the death, the association acting reasonably and in good faith could require further evidence."

McNally v. *Phoenix Ins. Co.*, 137 N. Y. 389 (appellee's brief, p. 17), shows that proofs of loss under a fire policy had been furnished within 10 days after the fire (p. 399) and the question involved was whether the proofs were adequate. The Court said that the "plaintiffs were doubtless bound to furnish them" (proofs of loss) "within a reasonable time * * *."

Commercial Casualty Ins. Co. v. *Stinson*, 111 F. 2d 63, cert. denied 311 U. S. 667 (appellee's brief, p. 17), held that proofs of accidental death were required and were a condition precedent to liability (p. 68, n. 12-14). The "proofs furnished * * * tended to establish her claim * * * that accidental death had occurred * * *" (p. 68, n. 12-14).

Lampert v. *John Hancock Mutual Life Ins. Co.*, 28 F. Supp. 142, aff'd no op. 107 F. 2d 1016, cert. denied 309 U. S. 663 (appellee's brief, p. 17), holds that due proof is a condition precedent to liability and that "the purpose of the policy provision requiring due proof of death is to give the insurance company basis to form an estimate of its liability before being obliged to pay" (p. 143, n. 1). In that case the proofs showed that the insured "jumped or fell from the Washington Bridge" (p. 143).

Companies deprived of all defenses, and of all right and opportunity to consider and investigate claims, or to adjust doubtful claims, etc.

The backbone of the insurance contract is the right to receive, consider and investigate claims, and to resist unjust claims, and to adjust doubtful claims. These rights are safeguarded by a vital provision in the policies that nothing is payable until due proof is furnished to the insurance company (R. 6-7, 14, 17, 65). This statute breaks that provision, upon which all of the other rights depend (R. 12, 65-6, 60, 52; our main brief, p. 6).

The Court of Appeals concedes that the companies are entitled to raise most defenses *except* the requirement of due proof (R. 66) but the concession is a hollow gesture indeed where the conceded facts show that it is utterly impossible to determine what defenses, if any, may apply to any particular policy until the proofs are received (R. 14).

That is an "inconvenience" the Court of Appeals concedes, but it sees no constitutional violation (R. 66). We think that the violation is the impairing of the provision for due proofs, which assures all of the other rights.

If the provision for due proofs is respected the companies will not be put in the absurd and impossible position of being called upon to determine, prematurely and hypotheti-

cally, whether any defenses, total or partial, may exist to any particular policy.

Were it possible to find out what has happened to these missing policyholders (whether they are dead, how they died, and their correct age, etc.) why should not the *State* be required to furnish proofs before collecting? How does the State get any greater rights than the policyholder or beneficiary?

The cases cited by appellee give no support to the theory that those rights can be brushed aside without violating the impairment and due process mandates of the Constitution.

People ex rel. Ryan v. *Lynch*, 262 N. Y. 1 (appellee's brief, p. 14) held that an appeal could not be taken, as a matter of right, to the New York Court of Appeals from a unanimous decision of the Appellate Division, where no constitutional question was presented, the issue being whether the appellant was a "resident" under the New York Income Tax Law, the Appellate Division having determined that he was a resident on the facts presented.

Guardian Life v. *Graves*, 268 App. Div. 809, affirmed without opinion at 294 N. Y. 953 (appellee's brief, p. 14), was an action to construe a premium tax law and was dismissed as "academic", there being no actual controversy over any taxes due or claimed by the State. No constitutional question was involved, and no danger of immediate or irreparable damage was apparent.

Carolene Products Co. v. *United States*, 323 U. S. 18 (appellee's brief, p. 14) held that a Federal act prohibiting shipment of "filled milk" in interstate commerce is constitutional.

Presumptions and burden of proof as to age; suicide, etc., are rules of evidence, not of themslves determinative of substantive rights.

The presumptions regarding age, suicide, etc., and the burden of proving certain defenses, are rules of evidence and procedure for the courtroom. If they were determinative of substantive rights, as suggested in appellee's brief (pp. 15-16), they would nullify most of the policy provisions—which is exactly what the statute does, with the help of the construction put upon it by the appellee and the courts below. None of the cases cited by appellee support such a result.

Incontestability clauses do not relate to coverage, but only to whether a policy was valid in its inception.

The fact that a policy may have been in force for a specified number of years may sometimes, under the so-called incontestable clause, prevent a contest as to whether the policy was valid in its inception. It does not mean that the policy must be paid in full regardless of age, cause of death, etc. (*Metropolitan Life* v. *Conway*, 252 N. Y. 449.)

Statute writes new terms into old policies.

Since this act is in no sense regulation, or an exercise of police power, the State could not properly insist upon writing escheat provisions into new policies. Here it writes new terms into old policies (simultaneously destroying the old terms), under the retroactive construction placed upon the act by the Court of Appeals (R. 65-6; 17). This clearly violates the impairment and due process clauses of the Constitution (*Lynch* v. *United States*, 292 U. S. 571, *Boswell* v. *Security Mutual*, 193 N. Y. 465, and others cited in our main brief at pp. 22-3).

Whether it is called an "escheat" or "custodial" act is unimportant.

Appellee frequently refers to the statute as "custodial", but the name is not important. Actually the State uses the money for its own purposes (R. 29-30; N. Y. State Finance Law, Sec. 95). Obviously it does not anticipate that many of the so-called missing policyholders will ever appear, and if some do the State is completely indifferent as to whether the rights of the companies, under the terms of the policies, are protected in any way—indeed the State could not resist any claim, no matter how unjust, without admitting that it never had any right to escheat in the first place (our main brief, pp. 21-2).

The State demands the full face amount of these policies, yet it is obvious that under many of these policies the full amount would never be justly payable if the true facts were known. It is equally obvious, indeed conceded, that it is impossible to ascertain the true facts in the absence of the proofs required by the policies (R. 14).

Amendment adding § 707 does not cure the statute.

Section 707 (our main brief, p. 41; appellee's brief, p. 32) was added (at the suggestion of the Attorney General, not the appellants), after this suit was commenced, but before it was heard. It says that after the insurance company has paid to New York, it may then pay *again* to any claimant who appears, whereupon the company becomes subrogated to the claimant's rights against the State.

It does not reimburse the company if another state has jurisdiction to escheat. It does not reimburse if the company pays $10,000 to the State, and it later develops that the claimant is only entitled to $5,000, or perhaps nothing, since the State keeps the difference—which never should have been taken from the company in the first place. It

does not reimburse the company for the cost of advertising and the service charge deducted by the State (Secs. 1407, 1409, R. 29-30).

Why New York companies are not attacking the act at present.

Why the New York companies are not presently attacking the statute is explained in our main brief (pp. 48-9). They did attack it in the *New York Life* case in 1939 which was discontinued after the legislative amendment of 1940. It is not correct to suggest that they consider the act constitutional. However, this has no legitimate bearing upon the suit at bar by the foreign companies, which promptly attacked the act after the amendment of 1944 and the Governor's veto of the repeal bill (our main brief, pp. 48-50).

Statutes of limitation abrogated and barred claims revived.

All statutes of limitation applicable to these policies are nullified by the statute (Sec. 1400; R. 27). This objection was raised below because the constitutionality of reviving barred claims had not been settled in New York (*Hopkins* v. *Lincoln Trust Co.*, 233 N. Y. 213; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271). The Court of Appeals held in the case at bar that they could be revived (R. 66). The question has not been urged upon this appeal because we suppose that the Court will not consider it a Federal question in view of its holding in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304.

New York Lacks Jurisdiction

Even the New York Legislature agrees that the State of incorporation (domicile) of the insurance company is the proper jurisdiction.

The statute, as originally enacted in 1939, based jurisdiction upon the State of incorporation (the domicile) of the insurance company, and applied to all so-called abandoned policies issued by New York companies regardless of the residence of the insured when the policy was issued or the place of delivery (our main brief, p. 48).

The New York Life Insurance Company attacked the act as unconstitutional but discontinued its suit when, in 1940, the Legislature amended the act so as to limit it to policies issued by New York companies upon the lives of residents of New York (our main brief, pp. 48-9). It still applied only to domestic companies (our main brief, p. 49).

In 1944, for the first time, the act was extended to foreign companies by the amendment which resulted in the suit at bar. At the next session of the Legislature, a bill was passed repealing the amendment, but was vetoed by the Governor, *not* because he disapproved of eliminating the foreign companies, but because the bill contained other provisions (objected to by the New York companies), basing jurisdiction upon the domicile of the insurance company, as originally provided in 1939 (our main brief, pp. 48-50).

Thus both the original and also the latest expressions of the Legislature accord jurisdiction to the State in which the insurance company was incorporated.

The amendment of 1944, extending the act to foreign companies is in the statute books only because the bill repealing it was vetoed for *other reasons*.

While there seems to be a difference of opinion between the Legislature and the Governor as to whether New York

should limit the act to policies issued upon the lives of residents of New York, both the Legislature and the Governor agree that the statute should not apply to foreign life insurance companies (our main brief, p. 49).

The amendment of 1944, the cause of this suit, stays on the books only because the Governor could not approve part of the repeal bill and veto the rest of it (our main brief, p. 49).

Unlike taxation, attachment, regulation, etc., jurisdiction to escheat can be only in one State.

Appellee cites, with emphasis (p. 18) *International Shoe Co.* v. *Washington,* 326 U. S. 310, which holds that corporations may be subjected to unemployment taxes in every State where they are doing business. Obviously the same policy cannot escheat to each of the many States in which each of these companies is doing business (R. 5).

In the same category are *Curry* v. *McCanless,* 307 U. S. 357, holding that two States may impose death taxes in some circumstances; *Hoopeston Co.* v. *Cullen,* 318 U. S. 313, sustaining State licensing requirements and regulations; *New England Mutual* v. *Woodworth,* 111 U. S. 138, sustaining the appointment of an administrator for a deceased policyholder in any State where the insurance company could be served with process; *Comey* v. *United Surety,* 217 N. Y. 268, holding that a insurer licensed in New York was not absent from the State for the purpose of its statute of limitations; *Morgan* v. *Mutual Benefit,* 189 N. Y. 447, which, stripped of *dicta,* merely held that service by publication could be made in any State where the insurance company was subject to process, citing *Harris* v. *Balk,* 198 U. S. 215, which held that a debt could be attached wherever the debtor can be served with process, as this does not expose the debtor to multiple liability because the first attachment reduces the debt pro tanto.

These cases show that for *some* purposes a debt has a situs in every State where the debtor can be served with process. This test has never been applied to escheat for the obvious reason that the same property cannot escheat to more than one State.

Abandoned property cases all give jurisdiction to domicile of the obligor.

All of the abandoned property cases (such as the *Anderson National*, the *Security Bank*, *Provident Institution*, *Brooklyn Gas Co.*, and *Philadelphia Electric* cases cited at pages 1-2 of this brief, and at page 9 of appellee's brief) give jurisdiction to the State where the obligor is incorporated (its domicile). That is where the contracts are payable and where the assets behind the contracts are located, as in the case at bar (R. 6-7). As to abandoned deposits in courts, the State where the court is located has jurisdiction to escheat (the *Klein* cases cited at page 1 of this brief, and at page 10 of appellee's brief).

Domicile of supposed obligee unknown and immaterial.

In none of these cases was the residence of the obligee considered material, and, of course, it was almost always unknown, and impossible to determine, as in the case at bar (R. 50, 9-10, 17, 44).

It should be noted that the statute at bar is not even concerned with the *present* domicile of the supposed *obligee*, but the domicile, *many years ago*, of the *insured*, who may never have had the slightest interest in the policy (R. 8-9, 14, 19; p. 31 of our main brief), and certainly has none now if the policy is to escheat because of his supposed death. In any event, the domicile of either, at either time, is unknown and virtually impossible to determine (R. 50, 9-10, 17, 44; p. 31 of our main brief).

Domicile of the insurance company is the only known jurisdictional factor.

Both sides cite *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (our main brief, p. 29, and appellee's brief, pp. 18-9). It holds that the three customary tests in determining situs and jurisdiction of debts (if such these be) are (1) the domicile of the creditor (which is unknown here), or (2) the domicile of the obligor (which *is known*, and *never changes*, being the home office of the insurance company in its State of incorporation), or (3) any place where the obligor can be found (which is obviously impractical since the same policies cannot escheat in each of the many States where these companies do business).

As Judge Cardozo said in the opinion, the choice is to be based upon "a common-sense appraisal of the requirements of justice and convenience in particular conditions" (p. 123). The State of incorporation (the domicile) of the insurance company seems to be the only choice available, and it is in accord with the many legal and practical considerations outlined in our main brief (pp. 26-33).

Escheat of abandoned accounts traditionally limited to domestic corporations.

That jurisdiction to escheat intangibles such as abandoned bank accounts, and other deposits, and unclaimed corporate dividends, etc., has always been deemed to be in the State where the debtor corporation is domiciled is indicated by the fact that no State has attempted to escheat accounts in banks or other corporations incorporated in other States. This is so in New York except as to life insurance policies (R. 11), and even as to these it was so until the amendment of 1944, and still would be so if the 1945 bill repealing the amendment had not been vetoed *for other reasons* (R. 10; also our main brief, p. 49).

Other States which have adopted such legislation have all limited it to domestic companies (our main brief, pp. 47 et seq.). This is all indicative of a strong general feeling that, in respect to escheat of corporate obligations, each State should confine its jurisdiction to domestic companies, in line with the rule applicable to real property and tangible personal property that such jurisdiction should be limited to property within its territorial limits.

Conflict with Pennsylvania statute.

The Pennsylvania statute (our main brief, pp. 47-8) appears to be limited to Pennsylvania companies and apparently applies to all so-called abandoned policies of Pennsylvania companies regardless of whether the policies were delivered in New York or elsewhere, and regardless of where the insured resided when the policies were issued. It does not mention foreign insurance companies, and has never been applied to them. In the courts below the appellee apparently agreed with us that this conflict existed.

As only one State can have jurisdiction to escheat the same property, it is proper to consider all factors, including the rights of other States.

In any event, the jurisdictional question here is whether New York has jurisdiction, and since jurisdiction to escheat can only be in one State, a decision either way by this Court would probably set the jurisdictional mold for all escheat legislation of this type, if policies of this kind are subject to escheat. Accordingly, it is proper to consider whether the State of incorporation or some other State would have a superior claim to jurisdiction, and all of the other legal, factual, and practical factors involved.

Weighty factors, we think, are that the original New York act, and also the 1945 bill vetoed by the Governor, and apparently the Pennsylvania act, accorded jurisdiction

to the State of incorporation (domicile) of the insurance company, which seems to be the only practical rule. It is also significant that Massachusetts, New Jersey, and apparently Connecticut have confined their legislation to domestic companies (our main brief, pp. 47-50).

The economy and practicability of dealing with one State instead of 48 on this particular subject is important. It would save the companies, and their policyholders generally, the cost of setting up staffs to deal with 48 State laws, each with its own regulations and elaborate report forms, etc., costing perhaps more than the amount of the policies involved.

As to the missing policyholders, the money (if it is to be taken from the insurance companies and their policyholders generally) would be as safe as anywhere in the custody of the State of incorporation which, after all, is where the policyholder put his insurance.

That New York has complete faith in the integrity of the States in which the companies are incorporated is shown by the fact that New York lets their home States hold the security deposits required of all companies (N. Y. Insurance Law, Sec. 103).

No "moot" contentions are made.

Appellee suggests (pp. 28-9) that some of our jurisdictional arguments are "moot", "apprehensive", etc. We see none of that type. In dealing with jurisdiction to escheat, where only one State can have jurisdiction, it is necessary to consider the legal and practical factors, and their probable effect (our main brief, pp. 26-32).

None of the cases cited by appellee are to the contrary.

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337 (appellee's brief, p. 28) holds that a Federal processing tax may properly provide that any refund must be claimed by the person who bore the tax, and that if the manufacturer passed the burden of the tax on to purchasers the purchasers should claim the refund. It was also held that the manufacturer might be entitled to relief if it were impossible to determine who had borne the burden of the tax.

Hodge Drive-It-Yourself Co. v. *Cincinnati*, 284 U. S. 335 (appellee's brief, p. 28) holds that an ordinance which requires companies renting "drive-it-yourself" automobiles to post a bond to protect the public against injuries resulting from negligent operation of the cars was a constitutional exercise of the State's police power, the operation of such cars being extra-hazardous to the public.

California v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308 (appellee's brief, p. 28) held that this Court would not hear California's claim for taxes after the taxes had been paid and the claim "extinguished", the only purpose of continuing the case being to get an advisory ruling on "moot" questions.

Waite v. *Dowley*, 94 U. S. 527 (appellee's brief, p. 29) held that a town in which a national bank was located could tax shares of the bank held by residents of the town, but that the Court was not called upon to decide whether other towns in which shareholders resided could levy such taxes, because the question had not been raised and was not necessary to the decision.

Rescue Army v. *Municipal Court*, 331 U. S. 549 (appellee's brief, p. 29), dismissed an appeal because the constitutional questions were not presented with sufficient clarity to enable the Court properly to pass upon them.

The constitutional rights of the companies and of all their policyholders are involved.

Appellee is mistaken in suggesting that we are urging the rights of any missing policyholders as such. We urge the rights of the companies, and of *all* of their policyholders, for what hurts the companies hurts them.

The cases cited by appellee seem far afield.

Tileston v. *Ullman*, 318 U. S. 44 (appellee's brief, p. 29) held that the patient, not her physician, was the proper party to complain if a statute forbidding contraceptives endangered her constitutional right to life.

Voeller v. *Neilston Warehouse Co.*, 311 U. S. 531 (appellee's brief, p. 29) holds (1) that a corporation is sufficiently representative of its majority stockholders to raise a constitutional issue on their behalf; and (2) that a notice, objecting to the sale of the corporate assets, given by dissenting stockholders to the corporation is notice to the majority stockholders.

McCabe v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151 (appellee's brief, p. 29) held that an injunction was properly refused where there was no showing that the plaintiffs lacked an adequate remedy at law and where it did not appear that the railroad planned to discriminate against persons of any color.

Appellants are not constructively New York corporations merely because they do business there.

Throughout the appellee's brief there is the constant suggestion, unsupported in fact or law, that the appellants are really New York corporations, and were only "originally incorporated" in other States and that these policies were issued by New York "agencies" or "branches" which have taken on the attributes of domestic New York companies.

The conceded facts are that the appellants are incorporated in other States and their business is located and transacted at their home offices in other States, except for the solicitation of insurance by local agents, who do not write insurance, or pay claims, or in any way manage the business (R. 5-7). All of the policies are written and issued at the home office, which is the place where all claims must be made, and are payable, under the terms of the policies, and where the officials and records of the companies, and the assets behind the policies, are located (R. 5-7).

The Court of first instance agreed that the domicile of the insurance company was the only sound and practical jurisdiction, but attempted to save the statute by giving the appellants a constructive domicile in New York (R. 43-51), a theory which was not followed by the Court of Appeals and is unsound in fact and in law.

Martine v. *International Life*, 53 N. Y. 339, and *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286 (cited in appellant's brief at pp. 24-5), have no application whatsoever, and were not adopted by the Court of Appeals as applicable here. The *Martine* case involved an English company which had a New York branch which was in all respects a distinct organization which issued insurance and paid claims, etc., and had its own board of directors and officers, and functioned entirely independently of the parent company. The *Moscow Fire* case held that New York had jurisdiction over securities deposited in New York by the New York branch of a Russian insurance company, which branch was "a complete and separate organization" (p. 309 et seq.) operating on local capital held by American trustees (p. 308), indeed an independent organization with "a definite separation and division of its property and even its juristic personality" (p. 309) from that of the parent company.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully,

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